GAN HAY CHONG v. SIOW KIAN YUH & ANOR.

[A.C.J. (Ajaib Singh J.) October 26, 1974]
[Seremban — Civil Appeal No. 1 of 1973]

Practice and Procedure — Appeal — Application for extension of time within which to file memorandum of appeal — Mistake of solicitor — Insufficient ground — R.S.C. 1957, O. 59 r. 2.

In this case the appellant had appealed against the decision of the Sessions Court. The memorandum of appeal was filed by the appellant's solicitors after the due date for filing. The appellants applied for an extension of time to file the memorandum of appeal and to serve it on the respondents. One of the grounds put forward was that the delay was a result of the misinterpretation by the solicitor of the law relating to the prescribed time within which to file the memorandum of appeal.

Held: (1) the mistake or oversight by the solicitor for the appellant did not constitute a valid or sufficient ground on which the court could exercise its discretion in favour of the appellant;

(2) the appellant had failed to show sufficient grounds upon which the court could extend the time for filing and serving the memorandum of appeal and therefore the application and the appeal would be dismissed.

Cases referred to:-

(1) *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1972] 1 M.L.J. 180.

(2) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.

(3) *Abdul Majeed* v. *Yeo Ching Tay* [1964] M.L.J. 75.

(4) *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed* [1974] 1 M.L.J. 58.

The following cases were also cited in argument: *Ahmad bin Yahaya & Anor.* v. *Ahmad bin Sulaiman* [1972] 2 M.L.J. 109, *Cheah Teong Tat* v. *Ho Gee Seng & Ors.* [1974] 1 M.L.J. 31, *Liew Chee Tat* v. *Lok Moon & Ors.* [1972] 2 M.L.J. 29, *The New India Assurance Co. Ltd.* v. *Karam Singh* [1972] 2 M.L.J. 26, *Singer Sewing Machine Co.* v. *Jeremiah* [1972] 2 M.L.J. 56 and 199, *Law Yee Wah & Anor.* v. *Poh Koh & Sons Realty Sdn. Bhd.* [1974] 2 M.L.J. 28.

APPLICATION.

Atma Singh Gill for the appellant.

H. B. Ball for the respondent.

Ajaib Singh J.: This was an application by notice of motion by the appellant for an extension of time within which to file a memorandum of appeal in the High Court and serve a copy thereof together with a copy of the appeal record on the respondents in an appeal from the decision of the Sessions Court at Kuala Pilah.

The facts leading to the application were as follows. On 8th June, 1972, the appellant was ordered by the learned President of the Sessions Court to give vacant possession of the right front portion of the ground floor of premises No. 132 Jalan Yam Tuan, Kuala Pilah, to the respondents. He was also ordered to pay arrears of rent, mesne profits and costs of the proceedings in the Sessions Court. Being dissatisfied with the decision of the learned President the appellant filed a notice of appeal againt the whole of the decision on 14th June, 1972, which was well within the time limit of fourteen days from the date of the decision of the Sessions Court as provided for in Order XXXIX rule 2(3) of the Subordinate Courts Rules, 1950. On 23rd May, 1973, the Sessions Court served on the appellant a notice in Form 40 in accordance with Order XXXIX rule 3(2) of the Subordinate Courts Rules intimating to the appellant that the appeal record was ready. On 26th May, 1973, the appellant's solicitors were supplied by the Sessions Court with one copy of the appeal record and it was not until 12th June, 1973, that two additional copies of the record were supplied to them. It must be pointed out here that it was wrong for the Sessions Court to have supplied only one copy of the appeal record on 26th May, 1973. Under Order XXXIX rule 3(1) and (4) of the Subordinate Courts Rules it was incumbent upon the Sessions Court to ensure that sufficient copies of the appeal record were prepared for the use of the High Court and the parties to the appeal and to enable the appellant to serve copies of the appeal record on the respondents within the prescribed period under Order 59 rule 2(2) of the Rules of the Supreme Court.

Under Order 59 rule 2(1) of the Rules of the Supreme Court the appellant was then required to file in the High Court in duplicate a memorandum of appeal within fourteen days from the date of service on him of the notice in Form 40 referred to in Order XXXIX rule 3(2) of the Subordinate Courts Rules. He also had to serve copies of the memorandum of appeal and of the appeal record on the respondents within the same period of fourteen days under Order 59 rule 2(2) of the Rules of the Supreme Court. The last day for the filing of the memorandum of appeal in the High Court and for the service of the memorandum and appeal record on the respondents was 6th June, 1973, but that day being a public holiday the last day fell on 7th June, 1973. However, the memorandum of appeal was filed by the appellant's solicitors in the High Court on 9th June, 1973, and was served on the respondents' solicitors on 11th June, 1973. The appeal record itself was served on the respondents' solicitors even later on 14th June, 1973, but for this delay the appellant's solicitors had a valid excuse because, as I have stated earlier, the Sessions Court had failed to supply the requisite number of copies of the appeal record on the appellant's solicitors on 26th May, 1973, when only one copy was supplied.

The appellant's application before me was supported by an affidavit affirmed by his counsel Mr. Atma Singh Gill. It reads as follows:—

"1. I am in charge of this appeal in which the appellant filed the notice of appeal through my firm on 14.6.72 from the judgment of the learned president of the Kuala Pilah Sessions Court dated 8.6.72, after having filed and served the Change of Solicitors.

2. In the court below Mr. Gurdial Bakan Singh had conducted the defence for the said applicant/appellant from whom, I had only obtained a copy of the Statement of Claim and Defence filed in the court below.

3. I was served with Form 40 on 23.5.73 at 2.20 p.m., informing the applicant/appellant that the Appeal Record was ready and to pay $127.50, but without the Appeal Record and the Bundle of exhibits.

4. On 25.5.73 the applicant/appellant paid into court the said sum of $127.50 plus a further sum of $150.00 as security by way of costs vide O. XXXIX r. 2(5)(b) of the Subordinate Courts Rules, 1950.

5. As Order XXXIX r. 3(2) of the Subordinate Courts Rules, 1950 does not stipulate the time for filing and serving the Memorandum of Appeal and together with the Appeal Record, I took it to be 14 days from the date of receipt of the Appeal Record, and overlooked O. 59 r. 2 of the Rules of Supreme Court, 1957.

6. Even if I had overlooked as aforesaid, if I had conducted the case in the court below, I would have filed and served the Memorandum of Appeal within 14 days of the service of Form 40 on me.

7. It was only on 26.5.73, I was served with only one copy of each of the Appeal Record and Exhibits Record and in order to prepare the Memorandum of Appeal, I had to read and re-read at least 46 pages of the Appeal Record and the 100 odd pages of the said Exhibit Bundle in order to acquaint myself of the issues involved in order to prepare the Memorandum of Appeal.

8. On account of the said oversight of Order 59 r. 2 as to time operating to run from the service of Form 40 and not within 14 days of the receipt of the Appeal Record coupled with the voluminous Appeal Record and the Exhibits Record, technically there has been a delay in filing and service of the Memorandum of Appeal by 2 days and as I was only supplied with a further copy of the Appeal Record and Exhibit Record on 12.6.73 which I served on the respondents' solicitors there appears to have been a delay of 3 days.

9. The applicant/appellant has a very good appeal on its merits, as there is abundance of proof that there were no arrears of rent as alleged when the alleged demand was made by the 1st respondent on the applicant/appellant.

10. By reason of the foregoing, I respectfully hereby urge upon the honourable court that in the circumstances the said delay, if any may be excused and time extended by 2 days for effecting such service of the said Memorandum of Appeal by 3 days for the service of the Appeal Record and the Exhibits Record, on the solicitors for the respondents in order to correct the position, so that this appeal could be heard on its merits."

Mr. Atma Singh Gill, learned counsel for the applicant, submitted that on the facts as deposed in his affidavit he had shown sufficient grounds for the court to allow the appellant's application. He said that the delay was a result of his misinterpretation of the law relating to the prescribed time within which to file the memorandum of appeal. This was a mere irregularity and the respondents were not in any way prejudiced. Also, the appellant had a good appeal on its merits. Mr. Humphrey Ball, learned counsel for the respondents, opposed the application and submitted that the appellant had shown no grounds upon which the court could exercise its discretion in his favour. A mistake or an oversight on the part of a legal adviser was not sufficient.

In the present application it was for the appellant to satisfy the court that he had sufficient grounds for an extension of time to file the memorandum of appeal in the High Court and have it served upon the respondents. From his affidavit and his submissions to the court it could be gathered that the grounds upon which Mr. Atma Singh Gill relied in support of his client's application were first, that he as the solicitor in charge of the appeal had overlooked Order 59 rule 2(1) of the Rules of the Supreme Court and had made a mistake in that he had misinterpreted the relevant provisions in the Rules of the Supreme Court and the Subordinate Courts Rules. Secondly, that he was served with only one copy of the appeal record and the exhibits which he described as voluminous and he had to read and re-read them in order to prepare the memorandum of appeal. Thirdly, that the appellant had a good appeal on its merits.

In my view, the appellant failed to show sufficient grounds upon which the court could extend time for filing and serving the memorandum of appeal. To say that the appellant had a good appeal on its merits was not a sufficient ground by itself without showing some other circumstance of a kind which the court could accept as a reasonable excuse for not filing and serving the memorandum within the prescribed period. The remaining grounds submitted by counsel for the appellant afforded no reasonable excuse for the delay. With regard to the submission that counsel had to read and re-read a voluminous appeal record in order to prepare the memorandum of appeal I need only state that the record including the exhibits was certainly not that voluminous as to require more than a few days to appraise oneself of the issues involved and it should not have taken very long for the appellant's solicitors to prepare a memorandum of appeal. If the appellant's solicitors were in real difficulty about preparing the memorandum they should have manifested it by applying for an extension of time promptly upon receiving the appeal record on 26th May, 1973. A memorandum of appeal is normally set out in a concise form and there is provision for its amendment on terms after it has been filed to correct any error or omission. The memorandum of appeal which the appellant's solicitors eventually filed in court contained nine short paragraphs spread over three typewritten sheets of paper of which almost a page consisted of the heading and other formal parts of the appeal.

A mistake by a solicitor is not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. In the case of *Chong Kueng Ying & Ors.* v. *Lovis Lavagna*[1] Suffian F.J. (as he then was) in dismissing an application for an extension of time to serve a notice of appeal said that:—

> "The ground on which special leave is asked is that the applicants' legal adviser has made a mistake. He was under the erroneous impression that under rule 7 it was not for him but for the court to serve the notice of appeal on the respondent. When he realised that it was for him to serve it, he was out of time.
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> In England the mistake of a legal adviser does not preclude a Court of Appeal from granting leave. That is the law since the amendment of the English R.S.C. in 1909. Before 1909 the English Court of Appeal had no discretion to grant leave if the appellant was out of time owing to a mistake of his legal adviser. See *Gatti* v. *Shoosmith*.[2]
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> The law here, however, is the same as the pre-1909 English law: the mistake of a legal adviser is not a sufficient ground for granting leave, see *Abdul Majeed* v. *Yeo Chng Tay*."[3]

Similarly, in the recent case of *Chin Hua Sawmill Co. Sdn. Bhd.* v. *Tuan Yusoff bin Tuan Mohamed*[4] it was held that the failure to serve a notice of appeal on the respondent within the prescribed period owing to the mistake of a solicitor was not a ground for granting special leave. In delivering the judgment of the Federal Court which dismissed the application for an extension of time to serve a notice of appeal on the respondent Ali F.J. had this to say:—

> "It is necessary to consider whether special leave should be given in this case. The affidavit in support of the notice of motion is that of Mr. Foo Say Ghee, the applicant's solicitor. In paragraph 16 Mr. Foo Say Ghee said that from February 9, 1973 until March 26, 1973 he was not in a proper and normal state of mind to conduct his office work. This was because he was personally involved in matters which have nothing to do with the applicant's case. In such a state of mind he said he inadvertently omitted to instruct his staff to serve the notice on the respondent or the respondent's solicitors. Here is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support the exercise of a discretionary power and that which

cannot. A mistake is a mistake whatever may be the reason for it. As to whether or not Mr. Foo's mistake amounts to negligence we express no opinion."

The two cases referred to above were concerned mainly with the question of granting special leave to appeal out of time from decisions of the High Court to the Federal Court. However, the principles enunciated in those cases are equally relevant to an application to the High Court for an extension of time to file a notice of appeal or the memorandum of appeal in an appeal from a Subordinate Court. The mistake or oversight by counsel for the appellant in the present case before me did not constitute a valid or sufficient ground on which I could exercise my discretion in favour of the appellant.

The appellant's solicitors might have had a good excuse for not serving the appeal record on the respondents in time because they themselves were not served with a sufficient number of copies of the record by the Sessions Court in time, but they certainly had no excuse for not filing and serving the memorandum of appeal in the High Court and on the respondents within the prescribed period. Rules of procedure are the machinery by which litigants may enforce or resist substantive rights and obligations under the law and to that end certain procedural acts are required by the rules to be performed within such limits of time as may be prescribed therein. The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown. The procedural handmaid cannot, without good reason, come to the rescue of slow-moving litigants and their legal advisers.

In the circumstances, therefore, I dismissed the application as well as the appeal itself with costs.

Application dismissed.

Solicitors: *Atma Singh Gill & Gill; Allen, Gledhill & Ball.*

PUBLIC PROSECUTOR v. WAH SEONG (M) TRADING CO. SDN. BHD.

[A.Cr.J. (Arulanandom J.) October 28, 1974]
[Penang — Criminal Appeal No. 8 of 1974]

Control of Supplies Act, 1961, ss. 15, 21 and 22(2) — Possession of controlled article — Reasonable suspicion of offence of concealing such controlled article — Facts showing that goods were stored for other persons — No grounds for reasonable suspicion.

In this case officers of the Enforcement Division Ministry of Supplies found that 36,815 bags of sugar were stored at the godown of Ghee Bee Rice Mills of which the respondents were the tenants. The respondents were charged for possession of the sugar in such circumstances as to raise a reasonable suspicion that an offence under section 15 of the Control of Supplies Act of concealing controlled articles in order to withhold the articles from the market had been committed by them. The appellants stated that they were storing the sugar on behalf of the Malayan Sugar Manufacturing Company Ltd. The learned president of the Sessions Court acquitted the respondents and the appellant appealed.

Held, dismissing the appeal: on the evidence adduced in court, no court could have convicted the respondents on the evidence of the prosecution and the learned president was therefore correct in acquitting and discharging the respondents.

CRIMINAL APPEAL.

Abdullah bin Ngah (Senior Federal Council) for the appellant.

Peter Mooney (*K. Ahmad* with him) for the respondents.

Arulanandom J.: This is an appeal against the decision of the learned President, Sessions Court, Butterworth, wherein he acquitted the respondent-company on a charge of possession of 36,815 bags of sugar which was a controlled article valued at about $1.4 million in such circumstances as to raise a reasonable suspicion that an offence under section 15 of the Control of Supplies Act of concealing such controlled articles in order to withhold the articles from the market had been committed by them and that they had thereby committed an offence under section 21 and punishable under section 22(2) of the Control of Supplies Act, 1961.

As the learned President has stated in his grounds of judgment, section 21 of the Act would appear to be a very wide section in its application. Any person who has possession or is in control of any controlled article in circumstances giving rise to a reasonable suspicion that an offence under this Act is or intended to be committed will be caught within its ambit. It is therefore necessary when construing the section to interpret it very strictly because as it appears the only thing the prosecution needs to prove is that there are circumstances which give rise to a reasonable suspicion, not based on whims or fancies or imagination.

In this case the prosecution relied mainly on its principal witness, one Aziz bin Hamzah, an Inspector with the Enforcement Division, Ministry of Trade and Industry, Penang, and it was wholly because he stated that there were circumstances which gave rise to a reasonable suspicion that the defendants were prosecuted. In his evidence he stated that he had gone to Ghee Bee Rice Mills where he found 36,815 bags of sugar and he suspected an offence under section 21 was being committed. His reasons for suspicion were that the amount was enormous and the godown was not a sugar godown but a rice mill and that there was nothing to indicate in the signboard outside that the sugar was being stored therein. He gave other circumstances as the fact that the respondent-company was not a producer, manufacturer, wholesaler or distributor of the manufactured sugar. To decide whether there were circumstances to raise a reasonable suspicion, the court has to consider all the circumstances before it can find in favour of the prosecution. If these circumstances named by the witness stood in isolation by themselves then perhaps any reasonable man might tend to suspect that an offence under section 21 of the Act had been committed but when construing a section of this nature, as I said earlier, it should be construed strictly. A reasonable suspicion means suspicion which any reasonable man may tend to have when examining a set of circumstances from a particular standpoint, in this case from the point of view of an enforcement officer concerned about hoarding of controlled articles. But in considering the circumstances it is essential that he should consider all the circumstances and not pick out circumstances to justify his suspicion and ignore circumstances which do not justify his suspicion. A prosecution can only be founded under this section if